accordingly limit the partisan activity of judicial candidates. Prior to *White*, twenty-nine States restricted direct personal solicitation of campaign funds by candidates running for judicial office. The decision below found both such restrictions either barred or severely limited by the First Amendment.

This Court should grant certiorari to clarify that the Constitution permits States to impose such restrictions, which directly advance state interests of the greatest importance. The decision below fails to accord appropriate deference to the state judiciaries' efforts to strike a balance between First Amendment interests and countervailing interests served by judicial independence that are also of constitutional magnitude. In addition, the decision below adopted an unprecedented "precise" tailoring requirement that makes it effectively impossible for States to impose meaningful restrictions upon partisan activities in supposedly nonpartisan judicial elections, or to ensure meaningful insulation of judges from their donors. For these reasons, this Court's review of the decision below is essential to the continued smooth functioning of the state judicial systems over which the members of *Amicus* preside.

ARGUMENT

I. THE DECISION BELOW INJECTS UNCERTAINTY INTO THE JUDICIAL ELECTION PROCEDURES THAT ARE EMPLOYED BY THIRTY-NINE STATES

In striking down Minnesota's partisan activity and personal solicitation restrictions, the Eighth Circuit confessed a "bias in favor of a system for the appointment of judges," *Republican Party of Minn. v. White*, 416 F.3d 738, 746 (8th Cir. 2005) (en banc), and in an earlier opinion the author of the decision recommended that Minnesota amend its Constitution to adopt such a system. *See Republican Party of Minn. v. Kelly*, 247 F.3d 854, 902 (8th Cir. 2001) (Beam, J., dissenting). But the large majority of States have persistently

declined to emulate the Federal Constitution by selecting judges through appointment. Accordingly, judicial independence in the state courts must be achieved by regulating rather than replacing the electoral process. The decision below has thrown such regulation into disarray.

A. Judicial Elections Are a Long-Standing and Widespread Feature of State Judicial Systems

The vast majority of States employ judicial election systems.[2] Today, fully thirty-nine States elect at least some of their judges,[3] and more than 85% of the state judges in the nation face elections.[4] Nearly all these thirty-nine States will

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[2] *See* AMERICAN JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2004), www.ajs.org/js/JudicialSelectionCharts.pdf.

[3] These thirty-nine States utilize a variety of judicial election systems. Thirty-two of them initially select at least some of their judges in contestable elections in which candidates run against an open field or an incumbent. *See id.* Among these States, eighteen use nonpartisan elections and thirteen use partisan elections. *See id.* One other State—Indiana—uses both since it varies election systems by county. *See id.* In addition, seventeen States employ retention systems in which judges are initially appointed but then run uncontested in nonpartisan retention elections where voters can vote yes or no on further terms. *See id.* Nine of these States use this method for some judges and contestable elections for others. *See id.* For example, California uses appointment and retention for its appeals courts while selecting trial court judges through nonpartisan contestable elections. *See id.* Altogether, thirty-two States employ some form of nonpartisan election, whether contestable or retention. *See id.* In recent years, efforts to move from election to retention systems have been rejected as voters and lawmakers have voiced a strong preference for contestable elections. *See* Seth Anderson, *Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793, 793-98 (2004).

[4] *See* AMERICAN BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS PART TWO 3 n.1 (1998).

hold some form of judicial election in 2006, thirty of them for their highest courts.[5]

State judicial elections date back to the mid-nineteenth century, when many States turned to judicial elections to avoid corruption and to reduce the partisan influence associated with judicial appointments under the so-called "spoils system." *See* Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 44 HISTORIAN 337, 342-47 (1983). Reformers supporting judicial elections believed that elected judges would be more "free from the corrosive effects of politics and able to restrain legislative power." *Id.* at 343.

For many States, however, this belief proved to be illusory because political parties were able to influence the judiciary through their control over nominations and their power in partisan elections. *See* F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 450-51 (2004). The next generation of reformers therefore sought to reduce party influence by making many judicial elections nonpartisan. *Id.* Some States went further by adopting retention election systems. *Id.* at 451-53.

Since the early twentieth century, some reformers have sought to persuade States to abandon judicial elections altogether and return to appointment systems. In 1906, then-Professor Roscoe Pound advocated the elimination of judicial elections, warning the American Bar Association that "compelling judges to become politicians . . . has almost destroyed the traditional respect for the bench." Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, Address Delivered at the Annual Convention of the

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[5] *See* JUSTICE AT STAKE CAMPAIGN, SCHEDULED SUPREME COURT ELECTIONS 2006-2008 (2005), http://www.justiceatstake.org/files/SCElections06to08.pdf.

American Bar Association (1906), *reprinted in* 46 J. AM. JUDICATURE SOC'Y 55, 66 (1962).

Such efforts have not succeeded: one hundred years ago roughly 86% of state judges were elected; today the number is 87%. *See* Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1401 n.24 (2003). Moreover, despite renewed efforts in recent years, States have made no movement to end contestable judicial elections. *Id.* To the contrary, ballot measures supporting judicial appointment have been resoundingly defeated. *See* Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C.L. 849, 886-90 (2001). Thus, judicial elections are highly likely to remain a feature of state judicial systems for the foreseeable future.

B. State Judicial Systems Urgently Need Guidance On the Scope of First Amendment Limits on Judicial Elections

The decision below exemplifies the confusion the States and lower federal courts are experiencing over which judicial election restrictions the First Amendment permits in the wake of this Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). *White* struck down a prohibition on statements by judicial candidates "announcing" their views on issues likely to come before them. *See id.* at 788. *White* was a narrow decision: the restriction it invalidated was one that only nine States still had and no State had ever enforced. *See id.* at 773 n.5 (noting that other jurisdictions had repealed the announce clause). And in reaching this narrow result, this Court cautioned that "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." *Id.* at 783.

Yet some courts, like the Eighth Circuit below, have read *White* broadly to prohibit virtually all regulation of judicial

elections that touches upon First Amendment interests. For example, the Eleventh Circuit has held (*sua sponte*) that the Court's decision in *White* prohibits all restrictions upon personal solicitation by judicial candidates. *See Weaver v. Bonner*, 309 F.3d 1312, 1322-23 (11th Cir. 2002), *reh'g and reh'g en banc denied*, 57 F.App'x 416 (11th Cir. 2003).[6] Other courts, by contrast, have understood *White* to permit States to impose restrictions preserving judicial independence. *See In re Dunleavy*, 838 A.2d 338, 349-51 (Me. 2003) (upholding prohibition on contribution to, or soliciting funds for, political organizations); *In re Raab*, 793 N.E.2d 1287, 1290-93 (N.Y. 2003) (upholding prohibition on partisan political activities).

In light of these conflicts among the courts, state officials cannot now be certain of the constitutionality of restrictions on judicial candidates during judicial elections. Unless reviewed and clarified by this Court, therefore, the decision below will cause disruption to the conduct of state judicial elections and potential damage to the public's perception of elected judges and of the state judiciaries as institutions.

II. ENSURING THE INDEPENDENCE OF STATE JUDGES FROM POLITICS SERVES COMPELLING INTERESTS

The principle of judicial independence is as old as the Republic. The Declaration of Independence lamented that the British monarch had "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and pay-

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[6] Other courts have extended *White* to require the invalidation of canons that forbid candidates from promising to rule in a particular manner. *See, e.g., Alaska Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080, 1083 (D. Alaska 2005); *North Dakota Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021, 1038-39 (D.N.D. 2005); *Family Trust Found. of Ky., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672, 704 (E.D. Ky. 2004); *cf. In re Watson*, 794 N.E.2d 1, 8 (N.Y. 2003).

ment of their salaries." THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776). The United States Constitution accordingly provided that federal judges would "hold their Offices during good Behaviour" and that their compensation "shall not be diminished during their Continuance in Office." U.S. CONST. art III, § 1. This principle was not limited to the federal judiciary during the founding period: as the Massachusetts Constitution of 1780 stated, "It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit." MASS. CONST. pt. 1, art. XXIX.

Judicial independence serves three compelling ends, each of constitutional magnitude: ensuring the rule of law, maintaining the separation of powers, and guaranteeing fair and impartial process to each litigant.

A. State Judiciaries Must Uphold the Rule of Law

Even when elected, "[j]udges remain different from legislators . . . in ways that bear on the strength of the state's interest in restricting their freedom of speech." *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993). While politicians are representatives of the people and must be responsive to the popular will, judges must uphold the rule of law without regard to their personal predilections or the interests of the voters. *See Chisom v. Roemer*, 501 U.S. 380, 411 (1991) (Scalia, J., dissenting); *see also Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong., S. Hrg. 109-158, at 379 (2005) ("Judges are not politicians. They cannot promise to do certain things in exchange for votes.").

Inherent in the concept of the rule of law as embodied in our federal and state constitutions is the notion that courts are to decide cases in accord solely with the law and facts, uninfluenced by judges' political affiliations, financial debts,

or other improper influences. For this reason, the qualifications and selection processes prescribed by federal and state constitutions for judicial office are different from those for political office.[7] States with judicial elections have no less interest than the federal system in courts that uphold the rule of law without regard to partisan influence.

B. State Judiciaries Must Be Independent of the Legislative and Executive Branches

Independence of the judiciary by definition requires lack of dependence upon the other branches. As Alexander Hamilton wrote in The Federalist, "liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments." THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Indeed, according to Chief Justice Marshall, "the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a *dependent* Judiciary." *O'Donoghue v. United States*, 289 U.S. 516, 532 (1933) (quoting 1829-30 Virginia State Convention). Accordingly, restrictions on state judicial election procedures designed to ensure judicial independence serve a compelling interest in preserving the separation of powers.

C. State Judiciaries Must Accord Fairness and Impartiality to Individual Litigants

Insulating judges from the winds of politics ultimately protects individual rights. As the Framers recognized, "[t]he complete independence of the courts of justice is peculiarly essential" because in a constitutional democracy, the judicial branch checks the political branches by protecting minority rights. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see* BERNARD BAILYN, THE IDEO-

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[7] For example, all States grant judges longer terms than other elective offices. *See* AMERICAN JUDICATURE SOC'Y, *supra*.

LOGICAL ORIGINS OF THE AMERICAN REVOLUTION 74-75 (1967) (recounting the Founders' view that without an independent judiciary "it would be ridiculous to look for strict impartiality [or] to expect that power should be confined within its legal limits, and right and justice done" (internal quotation marks omitted)). This is an interest of constitutional magnitude, as the Due Process Clause guarantees a "'fair trial in a fair tribunal'" with "no actual bias . . . or interest in the outcome" of the case. *Bracy v. Gramley*, 520 U.S 899, 904-05 (1997) (quoting *Withrow v. Larkin*, 421 U.S. 35, 46 (1975)).

In an analogous context, this Court has recognized a compelling interest in ensuring that Executive Branch officials execute the law "without bias or favoritism for or against any political party or group or the members thereof" and found this interest sufficient under the First Amendment to justify restrictions on election-related speech. *See U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 564-65 (1973); *accord Broadrick v. Oklahoma*, 413 U.S. 601, 606, 616-17 (1973); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 99-104 (1947). Surely if the neutral execution of the law is a compelling interest, neutral adjudication under law is compelling as well.

III. THIS COURT SHOULD CLARIFY THAT THE FIRST AMENDMENT PERMITS STATES TO ADVANCE THESE INTERESTS BY RESTRICTING PARTISAN ACTIVITY AND DIRECT SOLICITATION BY JUDICIAL CANDIDATES

In striking down Minnesota's partisan activity and direct solicitation restrictions, the decision below imposed an unprecedented and draconian standard of review. *Amicus* respectfully submits that nothing in *White* dictates such an analysis. Unlike the restrictions on partisan association and monetary contributions at issue here, *White* involved a direct limit upon the content of judicial candidates' core political

speech. *See White*, 536 U.S. at 792-93 (Kennedy, J., concurring) (noting that the announce clause was a content-based restriction). Very different interests are involved when a State limits judicial candidates' partisan activities. Such restrictions are aimed at protecting the independence of judicial decision making, not at preventing the flow of information to the public. Limiting judicial candidates' personal solicitations of campaign funds likewise differs from directly limiting campaign speech.

The lower court's stringent scrutiny departed from basic constitutional principles in two other respects as well. First, in holding that a State lacks any compelling interest in protecting judges from partisan political influence, *see White*, 416 F.3d at 753 n.7, the lower court failed to accord appropriate respect for State autonomy within the federal system. States are sovereign entities, and although they have ceded some of their sovereign authority to the federal government, they retain "wide authority to set up their state and local governments as they wish." *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 795 (1997). They retain in particular the authority to prescribe the manner in which they select judges. *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (noting that, even where fundamental constitutional interests are at stake, "[the Court's] scrutiny will not be so demanding" if a State's prerogative in designing the qualifications for its judges is at issue).

Second, by requiring that the restrictions be as "*precisely* tailored as possible," 416 F.3d at 751 (emphasis in original), the lower court failed to accord appropriate weight to the countervailing constitutional considerations that are at stake in *judicial* elections as opposed to other political contexts. "[W]here constitutionally protected interests lie on both sides of the legal equation . . . there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny.'" *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concur-

ring). In this setting, this Court should apply more flexible scrutiny than did the court below, determining whether the State has appropriately balanced the competing constitutional considerations in light of historical experience and practical imperatives. This is especially so in the electoral context, where there can well be "a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right." *Burson v. Freeman*, 504 U.S. 191, 213 (1992) (Kennedy, J., concurring) (upholding a restriction on political signs near polling places); *see id.* at 198-211 (plurality opinion); *Anderson v. Celebrezze*, 460 U.S. 780, 788-90 (1983); *Storer v. Brown*, 415 U.S. 724, 730 (1974). Under such appropriate scrutiny, both restrictions at issue should be upheld.

A. Partisan Activity Restrictions Directly Advance Compelling Interests

Nineteen States with contestable judicial elections have chosen to conduct them on a nonpartisan basis.[8] In such elections, ballots do not designate the partisan affiliation of the judicial candidates,[9] and candidates qualify for the ballot by

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[8] *See* ARIZ. CONST. art. VI, § 12(A); ARK. CODE ANN. § 7-10-102(a)-(b) (2005); CAL. CONST. art. II, § 6(a), art. VI, § 16(a)-(b); FLA. STAT. § 105.011(2) (2005); GA. CODE ANN. § 21-2-138 (2005); IDAHO CONST. art. VI, § 7; IND. CODE §§ 33-33-2-9(a), 33-33-82-31 (2005); KY. CONST. § 117; MINN. STAT. § 204B.06(6) (2005); MISS. CODE ANN. § 23-15-976 (2005); MONT. CODE ANN. § 13-14-111 (2005); NEV. REV. STAT. § 293.195 (2005); N.C. GEN. STAT. §§ 163-321, 163-322 (2005); N.D. CENT. CODE §§ 16.1-06-08, 16.11-11-08 (2005); OKLA. CONST. art. VII, § 9; OR. REV. STAT. § 254.005(9) (2003); S.D. CONST. art. V, § 7; WASH. REV. CODE § 29A.52.231 (2005); WIS. STAT. § 5.60(1)(a) (2005).

The States that use retention elections operate them on a nonpartisan basis as well. *See supra* note 3.

[9] *See, e.g.*, IDAHO CODE ANN. § 34-905 (2005); NEV. REV. STAT. § 293.267(3)(b) (2004); WASH. REV. CODE § 29A.36.171(2) (2005); *see also* UTAH CONST. art. VIII, § 9 (providing for nonpartisan retention ballots).

petition, by running in nonpartisan primaries, or by incumbency.[10]

States choose to conduct judicial elections in nonpartisan fashion principally in order to protect judges from partisan political influences that would compromise the independence of their judgments. As early reformers recognized, parties can exercise great power over judges elected in partisan elections by wielding control over the nomination process and influence over general elections. Sometimes this power manifests itself in appointments for guardians, receivers, and other positions that elected judges in partisan systems dole out to party loyalists. *See, e.g.*, Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 436-37 (2004); *see also* Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. MICH. J.L. REFORM 791, 826 (2004) (noting a party's refusal to renominate a judge who declined to hire a party-favored law clerk). At other times, partisan influence affects judicial decision making itself: according to one study, supreme court justices chosen in one state with partisan elections almost invariably voted for their party's interest in politically charged cases. *See* Jackson Williams, *Irreconcilable Principles: Law, Politics, and the Illinois Supreme Court*, 18 N. ILL. U. L. REV. 267, 290-91 (1998); *see also People ex. rel. Burris v. Ryan*, 634 N.E.2d 1066, 1067-68 (Ill. 1994) (Harrison, J., dissenting) (charging colleague with changing his vote in a redistricting case after deciding to change parties).

Nonpartisan judicial elections also serve compelling state interests in judicial impartiality by focusing voter attention away from partisan affiliation and onto the qualifications and legal ability of the candidates. Because of limited knowl-

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[10] *See, e.g.*, GA. CODE ANN. §§ 21-2-132(b)-(c), 21-2-138 (2005); MINN. STAT. §§ 204D.12(a), 204D.08(6) (2005); N.C. GEN. STAT. § 163-322 (2005).

edge, time or interest, voters in partisan judicial elections frequently ignore the legal abilities of candidates and vote solely upon party affiliation. *See* Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 19-25 (2003). The most celebrated victim of this phenomenon was Thomas Cooley, who served on the Michigan Supreme Court for twenty years and was widely seen as one of the leading judges of his era. *See, e.g.*, Paul D. Carrington, *Law as "The Common Thoughts of Men": The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 STAN. L. REV. 495, 495-97 (1997). Nevertheless, he was unseated in 1885 in an election in which Democrats won every contested seat. *See id.* at 496, 545; *see also* Kent Gernander, *Judicial Elections*, 57 BENCH & BAR OF MINN. 5, 5 (2000) (recounting a similar partisan fate suffered by the highly regarded Minnesota Supreme Court Justice William Mitchell).

Nonpartisan judicial elections provide a measure of stability to state judiciaries that helps preserve the reality and appearance of the rule of law. In partisan elections, incumbent (and therefore experienced) judges are more than twice as likely to be defeated than in nonpartisan elections. *See* Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1493 (2005). Consequently, as Thomas Cooley's fate shows, in States with partisan judicial elections, when political winds shift or strong candidates run at the top of the ticket, entire judiciaries can change overnight. *See also* Schotland, *Financing Judicial Elections*, *supra*, at 868 (noting that President Bush's landslide victory in Alabama allowed Alabama Republicans to take ten out of eleven statewide judicial seats); Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411, 1413, 1416-17 (2001) (discussing similar results in Texas judicial elections).

Finally, nonpartisan judicial elections serve compelling state interests in judicial impartiality and separation of powers because they are less likely than partisan elections to be distorted by partisan policy goals. In partisan judicial elections, candidates have sometimes used hot-button issues like abortion and gun control to motivate the party's base and increase turnout, even if judges are unlikely to face those issues. *See, e.g.*, Mike France *et al.*, *The Battle Over the Courts*, BUS. WK., Sept. 27, 2004, at 36. For example, in a 2002 North Carolina Supreme Court race a candidate promised to "support our Republican agenda" on abortion and other issues, even though the North Carolina Supreme Court had not had an abortion case before it for years. *See* Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 618-19 (2004).[11]

Restrictions on partisan activity by judicial candidates should be upheld when they directly advance these vital state interests, even if they cannot be "precisely" tailored to serve such interests because there are interests of constitutional magnitude on both sides. Where States seek to advance compelling interests in a politically neutral and independent judiciary that can ensure the rule of law, and are forced to balance those interests against other constitutional interests, the First Amendment should not be read to require States to make a stark choice between conducting judicial elections in

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[11] The contentiousness seen in nonpartisan races explains why they are, on average, approximately three times more expensive than nonpartisan elections. *See* DEBORAH GOLDBERG *ET AL.*, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002 21 (2002); *see also* DEBORAH GOLDBERG *ET AL.*, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004 26-27 (2004) (reporting more than $4.7 million in party contributions to two candidates in an Illinois race that cost the candidates more than $9 million); Schotland, *Financing Judicial Elections*, *supra*, at 874-75 (recounting roughly $4 million in party spending on issue ads during one Michigan election).

a partisan fashion and doing away with judicial elections altogether.

Partisan activity restrictions directly advance the above state interests. Indeed, without partisan activity restrictions, nominally nonpartisan judicial elections can readily be overtaken by politics as usual. Recent elections in Ohio illustrate the problem. Although Ohio uses nonpartisan ballots in general judicial elections, it does not significantly restrict partisan activities in those elections: candidates are free to speak at political gatherings and seek party endorsements, and they may identify themselves as a party's nominee. *See* OHIO CODE OF JUD. COND. Canon 7B(2)(g), 7B(3)(a). Recent judicial elections in Ohio have been very partisan, with political parties airing commercials of dubious accuracy attacking judicial candidates. *See, e.g.*, David Goldberger, *The Power of Special Interest Groups to Overwhelm Judicial Election Campaigns*, 72 U. CIN. L. REV. 1, 9 n.49 (2003).

Michigan has had a similar experience with partisan influence upon nominally nonpartisan elections. Like Ohio, Michigan uses nonpartisan ballots but allows judicial candidates to engage in partisan activities such as attending political gatherings and contributing to parties. *See* MICH. CODE OF JUD. CONDUCT Canon 7A(2). As in Ohio, recent judicial elections in Michigan have featured numerous party-sponsored commercials attacking judicial candidates.[12]

To avoid this sort of conduct, many States with nonpartisan judicial elections, like Minnesota, restrict the partisan activities of judicial candidates. Some of these restrictions parallel existing ethical rules for sitting judges. For example, both state and federal judges are generally admonished to refrain

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[12] *See, e.g.*, Schotland, *Financing Judicial Elections*, *supra*, at 871-72 (describing TV commercials run by both parties); BRENNAN CENTER FOR JUSTICE, REDUCING INJUDICIOUSNESS IN JUDICIAL ELECTIONS (July 2000), www.brennancenter.org/resources/resources_act_injudic.html (similar).

from political activity and specifically prohibited from holding office in political organizations, making speeches for such organizations, or contributing to them. *See* CODE OF COND. FOR UNITED STATES JUDGES, Canon 7A(1)-(3).[13] Nearly all States with nonpartisan judicial elections simply extend such ethical prohibitions one step further by similarly barring judicial candidates from holding party office or from

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[13] Forty-eight states limit the partisan political activities of sitting judges. *See* ALA. CANONS OF JUD. ETHICS Canon 7A(1); ALASKA CODE OF JUD. COND. Canon 5A(1); ARIZ. CODE OF JUD. COND. Canon 5A(1); ARK. CODE OF JUD. COND. Canon 5A(1); CAL. CODE OF JUD. ETHICS Canon 5A; COLO. CODE OF JUD. COND. Canon 7A(1); CONN. CODE OF JUD. COND. Canon 7; DEL. CODE OF JUD. COND. Canon 7; FLA. CODE OF JUD. COND. Canon 7A(1); GA. CODE OF JUD. COND. Canon 7A(1); HAW. REV. CODE OF JUD. COND. Canon 5A(1); IDAHO CODE OF JUD. COND. Canon 5A(1); ILL. CODE OF JUD. COND., Rule 67, Canon 7A(1); IND. CODE OF JUD. COND. Canon 5A(1); IOWA CODE ANN. Rule 51, Canon 7A; KAN. SUP. CT. RULE 601A, Canon 5A(1); KY. CODE OF JUD. COND. Canon 5A; LA. CODE OF JUD. COND. Canon 7A(1); ME. CODE OF JUD. COND. Canon 5A(1); MD. RULE 16-813, Canon 5A(1); MASS. SUP. JUD. CT. RULE 3:09, Canon 5A(1); MICH. CODE OF JUD. COND. Canon 7A(1); MINN. CODE OF JUD. COND. Canon 5A(1); MISS. CODE OF JUD. COND. Canon 5A(1); MO. SUP. CT. RULE 2.03, Canon 5A; MONT. CANONS OF JUD. ETHICS Canon 28; NEB. CODE OF JUD. COND. Canon 5A(1); NEV. CODE OF JUD. COND. Canon 5A(1); N.H. SUP. CT. RULE 38 Canon 5A; N.J. CODE OF JUD. COND. Canon 7; N.M. CODE OF JUD. COND. Rule 21-700A(3); N.Y. CODE OF JUD. COND. Canon 5(A)(1); N.C. CODE OF JUD. COND. Canon 7C(1); N.D. CODE OF JUD. COND. Canon 5A(1); OHIO CODE OF JUD. COND. Canon 7(B)(2)(a)-(b); OKLA. CODE OF JUD. COND. Canon 5A(1); PA. CODE OF JUD. COND. Canon 7A; R.I. SUP. CT. RULES art. VI Canon 5A(1); S.C. APP. CT. RULE 501, Canon 5A(1); S.D. CODE OF JUD. COND. Canon 5A(1); TENN. SUP. CT. RULE 10, Canon 5A(1); UTAH CODE OF JUD. COND. Canon 5B; VT. CODE OF JUD. COND. Canon 5A(1); VA. CANONS OF JUD. COND. Canon 5A(1); WASH. CODE OF JUD. COND. Canon 7(A)(1); W. VA. CODE OF JUD. COND. Canon 5A(1); WIS. SUP. CT. RULE 60.06(2)(b); WYO. CODE OF JUD. COND. Canon 5A(1).

making speeches on behalf of political parties,[14] and many also prohibit making contributions to political parties.[15]

Other partisan activity restrictions prevent judicial candidates from undermining the nonpartisan nature of the elections. For example, ten States prohibit judicial candidates in nonpartisan elections from declaring their party affiliations.[16] Others prohibit judicial candidates from seeking party endorsements,[17] and still other States prohibit candidates from endorsing other political candidates.[18]

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[14] *See, e.g.*, ARIZ. CODE OF JUD. COND. Canon 5A(1)(a)-(b); ARK. CODE OF JUD. COND. Canon 5A(1)(a), 5A(1)(c); CAL. CODE OF JUD. ETHICS Canon 5A(1)-(2); FLA. STAT. § 105.071(5), 105.071(9) (2005); GA. CODE OF JUD. COND. Canon 7A(1)(a)-(b); IDAHO CODE OF JUD. COND. Canon 5A(1)(a), 5A(1)(c); IND. CODE OF JUD. COND. Canon 5A(1)(a), 5A(1)(c); KY. CODE OF JUD. COND. Canon 5A(1)(a)-(b); MINN. CODE OF JUD. COND. Canon 5A(1)(a), 5A(1)(c); MISS. CODE OF JUD. COND. Canon 5A(1)(a)-(b); NEV. CODE OF JUD. COND. Canon 5A(1)(a), 5A(1)(c); N.D. CODE OF JUD. COND. Canon 5A(1)(a), 5A(1)(c); OKLA. CODE OF JUD. COND. Canon 5A(1)(a), 5A(1)(c); S.D. CODE OF JUD. COND. 5A(1)(a), 5A(1)(c); WASH. CODE OF JUD. COND. Canon 7A(1)(a)-(b); WIS. SUP. CT. RULE 60.06(2)(b)-(c).

[15] *See* CAL. CODE OF JUD. ETHICS Canon 5A(3); FLA. STAT. § 105.071(6) (2005); IDAHO CODE OF JUD. COND. 5A(1)(e); KY. CODE OF JUD. COND. 5A(1)(c); MINN. CODE OF JUD. COND. Canon 5A(1)(e); N.D. CODE OF JUD. COND. 5A(1)(e); OKLA. CODE OF JUD. COND. 5A(1)(d); WASH. CODE OF JUD. COND. 7A(1)(c); WIS. SUP. CT. RULE 60.06(2)(b)(3).

[16] *See* Pet. at 17 n.8; *see also* OKLA. STAT. tit. 20, § 1404.1(3) (2005).

[17] *See* Pet. at 17 n.8 (identifying three states).

[18] *See* ARK. CODE OF JUD. COND. Canon 5A(1)(b); CAL. CODE OF JUD. ETHICS Canon 5A(2); FLA. STAT. § 105.071(4) (2005); GA. CODE OF JUD. COND. Canon 7A(1)(b); IDAHO CODE OF JUD. COND. Canon 5A(1)(b); IND. CODE OF JUD. COND. Canon 5A(1)(b); KY. CODE OF JUD. COND. Canon 5A1(b); MINN. CODE OF JUD. COND. Canon 5A(1)(b); MISS. CODE OF JUD. COND. Canon 5A(1)(b); NEV. CODE OF JUD. COND. Canon 5A(1)(b); N.D. CODE OF JUD. COND. Canon 5A(1)(b); OKLA. CODE OF JUD. COND. Canon 5A(1)(b); S.D. CODE OF JUD. COND. Canon 5A(1)(b); WASH. CODE OF JUD. COND. Canon 7A(1)(b); WIS. SUP. CT. RULES 60.06(2)(b)(4).

Contrary to the lower court's opinion, it makes no difference in the judicial election context that partisan activity restrictions like Minnesota's might distinguish between political parties and special interest groups. *See White*, 416 F.3d at 753 n.7, 759-60. Because political parties select and endorse candidates, set political agendas, and wield special power in elections, they have influence over political candidates and legislative outcomes that vastly exceeds that of any interest group. *See, e.g., McConnell v. FEC*, 540 U.S. 93, 145-46 (2003). Thus partisan activity restrictions on judicial candidates preserve the separation of judicial from legislative and executive power in a way that is irrelevant to private interest groups. *See id.* at 145 (noting that parties are unique because they "enjoy a special relationship and unity of interest" with legislative officeholders).

B. Personal Solicitation Restrictions Directly Advance Compelling State Interests

Prior to *White*, twenty-nine States prohibited judicial candidates from personally soliciting campaign contributions. They did so in order to prevent the actual or perceived bias that occurs when donors become litigants. *See* Pet. at 13-16 & n.5. The decision below conceded that Minnesota has a compelling interest in preventing such bias from infecting judicial decision-making. But it concluded that it was unnecessary to restrict judicial candidates from personally signing donation solicitation letters or soliciting money from "large" groups to serve that interest because campaign committees were already barred from informing candidates of the identities of individuals asked to contribute. *See* MINN. CODE OF JUD. COND. Canon 5B(2).

This Court should review the lower court's application of such stringent review. The court's reasoning erroneously ignores the States' compelling interest in preserving the appearance of justice and judicial integrity. *See, e.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *Cox v.*

Louisiana, 379 U.S. 559, 565 (1965); *In re Raab*, 793 N.E.2d 1287, 1291 (N.Y. 2003). Even assuming candidates studiously avoid learning the identities of potential donors, the appearance of justice is still undermined because recipients of solicitation letters have no way of knowing that the candidates signing the letters are unaware of their identities. Indeed, the ordinary message communicated by a signature conveys the opposite conclusion. Likewise, although it might be plausible that a candidate soliciting money from a "large" group will not know everyone in the group, it is implausible that the candidate will know nobody. Indeed, since most judicial campaign contributions come from lawyers and litigants with business before the courts, *see* GOLDBERG *ET AL.*, NEW POLITICS 2002, *supra*, at 18, it defies reason to believe that the size of a group will preserve the attendees' anonymity.

Moreover, the decision below ignores the "unique regulatory difficulties" that are involved in restricting personal solicitations, which are "'not visible or otherwise open to public scrutiny.'" *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 641 (1985) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 466 (1978)) (distinguishing lawyer advertising from in-person solicitation). The First Amendment does not require the States to assume that conduct behind closed doors is lawful.

It is difficult to imagine any solicitation restriction that would survive the scrutiny applied by the decision below. As these restrictions lie at the very core of States' efforts to preserve a legitimate and unbiased judiciary, the Court should accept this case to clarify that States may impose meaningful limitations on campaign fundraising.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MARTHA HOLTON DIMICK, CHAIRPERSON,
MINNESOTA BOARD ON JUDICIAL STANDARDS, *et al.*,

Petitioners,

v.

REPUBLICAN PARTY OF MINNESOTA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* FORMER CHIEF JUSTICES IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Whether a rule that prohibits judicial candidates from personally soliciting campaign contributions violates the First Amendment.

2. Whether a rule that prohibits judicial candidates from engaging in partisan political activities violates the First Amendment.

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae are eighteen former Chief Justices from fifteen States.[2] They have an abiding interest in upholding the independence, impartiality, and stature of the state judicial systems over which they have presided.

Amici are deeply concerned with the impact of the decision of the U.S. Court of Appeals for the Eighth Circuit in this case. Based on their collective experience, *amici* believe that the elimination of ethical constraints on solicitation of funds and partisan political activity will lead to a downward spiral in conduct during judicial elections, with a concomitant diminution in public respect for the courts. *Amici* further believe that the state and federal courts have reached conflicting results and that this tension will create widespread uncertainty and distracting litigation during future judicial elections. *Amici* therefore urge this Court to grant review and resolve the issues presented in the petition before the next election cycle.

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[1] Counsel of record for both petitioners and respondents have consented to the filing of this brief in letters that have been lodged with the clerk. No counsel representing a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] The former Chief Justices are: Perry O. Hooper, Sr. (Alabama); Thomas Zlaket (Arizona); Jack W. Holt, Jr. (Arkansas); Malcolm M. Lucas (California); Major L. Harding (Florida); Stephen H. Grimes (Florida); Benjamin K. Miller (Illinois); Vincent L. McKusick (Maine); Conrad L. Mallet, Jr. (Michigan); A.M. (Sandy) Keith (Minnesota); William Charles Hastings (Nebraska); James G. Exum, Jr. (North Carolina); Henry Frye (North Carolina); Burley B. Mitchell, Jr. (North Carolina); Robert A. Miller (South Dakota); Harry L. Carrico (Virginia); Robert F. Utter (Washington); Nathan S. Heffernan (Wisconsin).

The petition seeks review of a decision holding unconstitutional two provisions of the Minnesota Canons of Judicial Conduct. The solicitation clause, Canon 5B(2), prohibits a judicial candidate from personally soliciting campaign contributions. The partisan activities clause, embodied in Canons 5A(1) and 5B(1), prohibits a judicial candidate from identifying himself as a member of a political party, speaking at political party gatherings, and seeking or accepting an endorsement from a political party. The Eighth Circuit found each of these clauses unconstitutional under the First Amendment.

Amici respectfully believe that this decision is in error. It also has the kind of widespread effect that warrants this Court's review. That impact is reflected in the range of States represented by these *amici*, who have served as Chief Justices of the States of Alabama, Arizona, Arkansas, California, Florida, Illinois, Maine, Michigan, Minnesota, Nebraska, North Carolina, South Dakota, Virginia, Washington, and Wisconsin.

Amici speak from experience. As Chief Justices, they were responsible for the integrity of the courts in their respective States. Their responsibilities included the promulgation of ethical rules for judges, interpretation of those rules, and the application of the rules in particular cases. In addition, each of the former Chief Justices comes from a State where some judges are elected. Finally, nearly all *amici* have had the personal experience of participating in the electoral process, and confronting directly the sensitive issues of fundraising and the role of political parties.

Based on their collective experience, *amici* believe that the ethical constraints at issue here serve compelling interests. Without them, judges running for office would be free to take a personal role in soliciting contributions from the litigants and lawyers who come before them. Even in the absence of actual corruption, such personal requests for

money will erode public confidence in the impartiality of the judiciary.

At the same time, restraints on judicial partisan activities preserve the public's confidence in the neutrality of the courts. Without effective restraints, nonpartisan elections are impossible. Judicial elections will feature all of the partisanship of other elections, and it will appear that judges owe their success to the political parties whose endorsements they have sought and accepted. This is a very real threat to the effective functioning of the judicial branch, which has a special responsibility to remain independent, so that it may assess the validity of actions taken by the political branches and protect the rights of political minorities. Judges whose election campaigns are predicated on their allegiance to particular parties will necessarily have difficulty in maintaining the reality and perception of independence from the political branches.

These consequences have been felt already, but the decision below portends even more. Many States with judicial elections have rules similar to the ones in this case. The Eighth Circuit's decision places these state rules in doubt. And the lingering uncertainty over the validity of these regulations will spawn confusion, conflict, and claims of unfairness in every judicial election until the constitutional ground rules are clarified.

Amici, therefore, urge this Court to grant the petition now and resolve the issues presented.

STATEMENT OF PROCEEDINGS

This is the second occasion for Supreme Court review in this case. Respondents originally challenged three provisions of the Minnesota Canons of Judicial Conduct: the two clauses at issue here and the "announce clause," which prohibited a judicial candidate from announcing his or her views on disputed legal issues. The Court of Appeals upheld

all three clauses. *Republican Party of Minn. v. Kelly*, 247 F.3d 854 (8th Cir. 2001). Respondents then filed a petition for certiorari, seeking review of the rulings with respect to two of the clauses—the announce clause and the partisan activities clause—while not presenting the solicitation clause.

This Court granted certiorari, but limited its grant to the question concerning the announce clause. 534 U.S. 1054 (2001). The Court subsequently held the announce clause unconstitutional. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002). The Court concluded that the clause was not narrowly tailored to serve the asserted interest in impartiality, in the sense of lack of bias for or against either party to the proceeding, since the clause was aimed at speech on issues, not for or against particular parties. This Court warned, however, that it was "neither assert[ing] nor imply[ing] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." *Id.* at 783.

On remand, a panel of the Eighth Circuit again upheld the solicitation and partisan activities clauses. *Republican Party of Minn. v. White*, 361 F.3d 1035 (8th Cir. 2004). After rehearing the case en banc, the Eighth Circuit struck down both clauses. 416 F.3d 738 (8th Cir. 2005). Relying on *White* and applying strict scrutiny, the majority found the restrictions both too broad and underinclusive in light of their justifications. Three judges dissented from the ruling on the partisan activities clause and four judges dissented on the solicitation clause.

The State parties thereafter filed the instant petition for certiorari, seeking review of the rulings on the solicitation and partisan activities clauses. *Amici* submit that this petition has merit and should be granted.